STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

SECRETARY OF STATE

In re:	
Request for Regulatory Determination filed by SAN DIEGO UNIFIED SCHOOL DISTRICT concerning guidelines in the "Adjustment Worksheet" and "Claim Review Procedures" issued by the CALIFORNIA STATE CONTROLLER'S OFFICE for the review of Open Meeting Act reimbursement claims	**1999 OAL Determination No. 25** **Docket No. 98-010** **October 29, 1999** **Determination pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2**

Determination by: **CHARLENE G. MATHIAS, Deputy Director**

HERBERT F. BOLZ, Supervising Attorney
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Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law concludes that guidelines used by the State Controller's Office in the review of certain reimbursement claims from local governments and school districts are "regulations" which are invalid because they should have been, but were not, adopted pursuant to the Administrative Procedure Act.

DECISION [2, 3, 4, 5, 6]

The Office of Administrative Law ("OAL") has been requested to determine whether guidelines in the "Open Meeting Act Chapter 641/86 Adjustment Worksheet" and "State Controller's Office, Division of Accounting and Reporting, Open Meeting Act Claim Review Procedures" issued by the California State Controller's Office ("SCO"), which assign 30 minutes per page and 5 minutes per agenda for reimbursement for the preparation and posting of Open Meeting Act agendas, are "regulations" which must be adopted pursuant to the APA.[7]

OAL has concluded that these guidelines constitute "regulations" which should have been, but were not, adopted in accordance with the APA.

DISCUSSION

I. AGENCY; REQUEST FOR DETERMINATION

The California State Controller is one of the elected offices identified in the California Constitution.[8] The SCO superintends the fiscal matters of the state.[9] Money may be drawn from the California Treasury only upon a SCO warrant.[10] By statute, the SCO will not draw a warrant for any claim until it has been audited by the SCO as required by law.[11]

On August 29, 1986, the Governor approved chapter 641 of the statutes of 1986, which added sections 54954.2 and 54954.3 to the Government Code. Subdivision (a) of Government Code section 54954.2 requires that the legislative body of each local agency prepare and post an agenda containing a brief general description of each item of business at least 72 hours prior to each meeting. Uncodified section 12 of chapter 641 provides for reimbursement to local agencies and school districts for costs mandated by the state through this act pursuant to Part 7 (commencing with section 17500) of Division 4 of Title 2 of the Government Code.

On October 28, 1998, OAL received a request for determination the San Diego Unified School District, alleging that:

> "The SCO has applied a rule of general application to deny portions of Open Meetings Act reimbursement claims filed by local agencies and school districts. The SCO determined that the preparation of the

descriptions of items on an agenda (including writing or composing the description, typing the description, and reviewing and editing the description) requires 30 minutes per page of agenda. The SCO further determined that the posting of an agenda requires five minutes. The SCO applied these 30 minutes per page and five minutes per agenda time periods as general standards, establishing the maximum amount that the SCO would approve for payment. Costs claimed in excess of this amount were deemed by the SCO to be excessive. The SCO adopted this rule of general application, used the rule to deny reimbursement, and is enforcing or attempting to enforce this rule to all local agencies and school districts, all without complying with the requirements in Government Code sections 11346 *et seq.*"

The SCO's rule of general application is clearly stated in the SCO's 'Adjustment Worksheet' and 'Claim Review Procedures' that the SCO uses to adjust reimbursement claims filed by local agencies and school districts. . ."[12]

A copy of the SCO's "Open Meeting Act Chapter 641/86 Adjustment Worksheet" ("Adjustment Worksheet") and the first two pages of the "State Controller's Office, Division of Accounting and Reporting, Open Meetings Act Claim Review Procedures ("Claim Review Procedures") submitted by the requester are attached to this determination as Appendices "A" and "B," respectively.

The SCO contends that OAL should not entertain the instant request for determination because the APA does not apply to requesters who are not private persons or entities.

"A finding that the time reference point is not required to be promulgated through the APA would be consistent with the legislative intent behind the APA. The legislative intent in enacting the APA was to protect *private* persons and entities from incomprehensible administrative regulations and to establish a uniform procedure for their enactment. Government Code section 11340, (d), provides, in pertinent part, 'The imposition of prescriptive standards *upon private persons and entities* through regulations. . . has placed an unnecessary burden *on California citizens . . .*' Section 11340.1 provides, 'It is the intent of the Legislature that agencies shall actively shall actively seek to reduce the unnecessary regulatory burden *on private individuals and entities . . .*'"

"Consequently, the class of individuals that the Legislature intended to protect in enacting the APA were those private individuals, not another arm of the State, such as school districts, Requesters in this case. *(Butt v. State of California* (1992) 4 Cal.4th 668, 681, citing *Hall v. City of Taft* (1956) 47Cal.2d, 177, 181 [Local school districts are the State's agents for local operation of the common school system]). The system of public schools, although administered through local districts created by the legislature is 'one system. . . . applicable to all the common schools.' *(Kennedy v. Miller* (1983) 97 Cal.429, 432*)*. Management and control of the public schools [is] a matter of state, [not local], care and supervision. *(Butt v. State of California* (1992*)* 4 Cal.4th 668, 680-681)."

"Any findings by this forum that the SCO would have to promulgate regulations in accordance with the APA in dealing with another arm of the State would therefore be contrary to the intent of the drafters of the APA. Thus, the APA does not apply to Requesters who are not private persons and entities in this case and the APA is therefore inapplicable here."[13]

Some statutes and court decisions limit the availability of a particular remedy to persons who have "standing" to sue. The APA does contain such a limitation for those seeking relief in superior court. Subdivision (a) of Government Code section 11350 provides in part:

"*Any interested person* may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure. . ." [Emphasis added.]

A person not demonstrably "interested" lacks standing. Of course, even this limitation in the APA does not restrict judicial relief under the statute to private persons and entities. By contrast, no requirement whatsoever for "standing" is attached to a request for a determination pursuant to Government Code section 11340.5, subdivision (b). That provision states:

"If the office *is notified of, or on its own, learns of* the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the

guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (g) of section 11342." [Emphasis added.]

If the Legislature had intended to limit determinations under Government Code section 11340.5 to instances where OAL received a request from a private person or entity (as it limited judicial relief under Government Code section 11350 to "interested" persons), it would have so provided. Instead, Government Code section 11340.5 includes no limitation whatsoever on who may notify OAL of an underground regulation and even allows OAL (itself a state agency) to issue a determination in the absence of a request from anyone. This is of course consistent with the overall legislative objective of eliminating underground regulations.

The SCO states in its response to this request for determination that:

> "Any findings by this forum that the SCO would have to promulgate regulations in accordance with the APA in dealing with another arm of the state would therefore be contrary to the intent of the drafters of the APA. . . ."[14]

If this were true, OAL would not have to go through the rulemaking process in adopting its own regulations implementing, interpreting and making specific APA requirements applying to the other state agencies. Very clearly, this was not the intent of the Legislature. To the contrary, it is clear that the rulemaking process was intended to provide other state agencies with the opportunity to comment on the proposed regulations of the adopting agency. Before a regulation can be adopted by a state agency, it must be made available for comment.[15] Government Code section 11346.5 provides in subdivision (a)(6) that the notice of the rulemaking action must include an estimate of the cost or savings of the regulatory change *to any state agency*.

More importantly with respect to this particular request for determination, it is readily apparent that the APA was intended to be a tool which can be used to protect the finances of local government. Subdivision (a)(6) of Government Code section 11346.5 also requires the notice of a proposed regulatory action include an estimate of

". . .the cost to *any local agency or school district* that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 [of the Government Code], [and] other nondiscretionary cost or savings imposed on local agencies, . . ." (Emphasis added.)

Subdivision (a)(5) of Government Code section 11346.5 also requires that the notice of a proposed regulatory action include:

"A determination as to whether the regulation imposes a mandate *on local agencies or school districts* and, if so, whether the mandate requires state reimbursement pursuant to Part 7 (commencing with section 17500) of Division 4 [of the Government Code]." (Emphasis added.)

In fact, the Commission on State Mandates has itself adopted regulations contained in the California Code of Regulations governing the submission of the very claims which are the subject of this determination.[16]

In conclusion, it must be noted that, consistent with legislative intent with respect to Government Code section 11340.5, OAL by regulation has defined "Request for determination" as a "request made by *any person* to [OAL], in accordance with the procedures specified in this article. . . as to whether a state agency rule is a 'regulation' as defined in Government Code section 11342(g)." (Emphasis added.)[17] The proposed regulation was of course made available to both private and public persons and entities for comment during the rulemaking process.

II. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE SCO?

Government Code section 11000 states:

"As used in this title [Title 2. "Government of the State of California" (which title encompasses the APA)], 'state agency' includes every state office, officer, department, division, bureau, board, and commission."

The APA narrows the definition of "state agency" from that in section 11000 by specifically excluding "an agency in the judicial or legislative departments of the state government."[18] The SCO is in neither the judicial nor legislative branch of state government. There is no express statutory exemption which would permit the SCO to issue rules without complying with the APA.

The SCO states in its response to this request for determination that:

> "It is well established that the Controller has implied constitutional authority to audit all expenditures from the State Treasury. (71 Ops.Cal.Atty.Gen. 275). Additionally, the California Constitution expressly provides in Article XVI, Section 7:
>
> > 'Money may be drawn from the Treasury only through an appropriation *made* by law and upon a Controller's *duly drawn warrant.* (Emphasis added).'"
>
> "The meaning of this constitutional requirement of a 'duly drawn warrant' was defined in 71 Ops.Cal.Atty.Gen. 275, 282, as follows:
>
> > 'As found by the Supreme Court in *Flournoy v. Priest, supra*, 5 Cal.3d 350, 354, this language was specifically incorporated into the Constitution 'to assure the Controller's concurrence in the expenditure of state funds.' Meaningful concurrence necessarily requires the development of information through normal auditing procedures concerning the claims filed for payment.'"
>
> "As concluded in the Attorney General's opinion, the Controller has constitutional authority to audit state expenditures to determine whether issuance of a warrant would be lawful; that authority cannot be restricted by legislative enactment."[19]

In *Engleman v. State Board of Education* (1991)[20] the Third District Court of Appeal was asked to determine whether rules adopted by another state agency with constitutional authority were subject to the APA.

> "In this case we face a variation on the recurrent theme of executive agencies seeking to implement 'house rules' unfettered by any outside constraints--rules sometimes called 'underground regulations.' *(See Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 205, 149 Cal.Rptr. 1, 583 P.2d 744; *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244.) Article IX, section 7.5 of the California Constitution succintly provides that 'The State Board of Education [Board] shall adopt textbooks for use in grades one through eight throughout the State, to be furnished without cost as provided by statute.' The central question in this

case is whether this delegation of constitutional authority to the Board renders all its rules and procedures for adopting textbooks beyond the reach of the Administrative Procedures Act (APA). (See Gov. Code, § 11370; Stats. 1980, ch. 204, § 7, p. 434.) The trial court ruled that it did not. We agree and shall hold that short of its power to make the ultimate selection among textbooks, the Board is no different than any other executive agency, and thus the governing procedures and criteria it develops for the purpose of selecting textbooks must comply with the APA. Accordingly, we shall affirm."[21]

". . . . the fact that the Board has self-executing authority under the Constitution does not preclude the Legislature from enacting laws delineating that authority. (*Chesney v. Byram* (1940) 15 Cal.2d 460, 463, 101 P.2d 1106; *Armstrong v. County of San Mateo* (1983) 146 Cal.App.3d 597, 609, 194 Cal.Rptr. 294.) It is well established the Legislature may define, limit, or condition a constitutional power or right so long as it does not unduly burden the exercise of that power or right. (Cf. Chesney, supra, 15 Cal.2d at p. 465, 101 P.2d 1106; *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 75-76, 222 Cal.Rptr. 750; 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 52, p. 95.) Consequently, while the Board has a potential constitutional source of authority to adopt procedures if the Legislature does not act to implement that authority, once the Legislature does act to provide a procedure for textbook adoption, the Board must act under authority of those statutes. . . ."[22]

Although the California Constitution does not specifically authorize the SCO to conduct audits of claims against the state, the Legislature has enacted a number of laws "delineating that authority."

Section 12410 of the Government Code provides:

"The Controller shall superintend the fiscal concerns of the state. The Controller shall audit all claims against the state, and may audit the disbursement of any state money, for correctness, legality, and for sufficient provisions of law for payment. Whenever, in his opinion, the audit provided for by Chapter 4 (commencing with Section 925), Part 3, Division 3.6 of Title 1 of this code is not adequate, the Controller may make such

field or other audit of any claim or disbursement of state money as may be appropriate to such determination."

Subdivision (a) of Government Code section 925.6 provides:

> "The Controller shall not draw his or her warrant for any claim until it has been audited by him or her in conformity with law and the general rules and regulations adopted by the board, governing the presentation and audit of claims. Whenever the Controller is directed by law to draw his or her warrant for any purpose, the direction is subject to this section."

The SCO has cited other legislation in its response to this request for determination which directly addresses audits of claims for reimbursement of state mandated costs and, more specifically, claims for reimbursement of state mandated costs submitted pursuant to section 12 of chapter 641 of the Statutes of 1986.

> "Additionally, with respect to claims for reimbursement of mandated costs, Government Code section 17561, subdivision (d)(2), provides that the Controller 'may reduce any claim, which the Controller determines is excessive or unreasonable.'"
>
> "With reference specifically to this particular mandate, the Legislature enacted Government Code section 54954 [should read 54954.4] in 1991 providing in part as follows:
>
> > (a) The Legislature hereby finds and declares that Section 12 of Chapter 641 of the Statutes of 1986, authorizing reimbursement to local agencies and school districts for costs mandated by the state pursuant to that act, *shall be interpreted strictly*. The intent of the Legislature is to provide reimbursement for only those costs which are *clearly and unequivocally incurred as the direct and necessary result* of compliance with Chapter 641 of the Statutes of 1986.
> >
> > (b) In this regard, the Legislature directs all state employees and officials involved in reviewing or authorizing claims for reimbursement, or otherwise participating in the reimbursement process, *to rigorously review each claim and authorize only those claims*, or parts thereof, which represent costs which are clearly and

unequivocally incurred as the direct and necessary result of compliance with Chapter 641 of the Statutes of 1986 *and for which complete documentation* exists. [Emphasis in original]."

OAL, therefore, concludes that APA rulemaking requirements generally apply to the SCO and, more specifically, to its auditing of claims submitted pursuant to section 12 of chapter 641 of the Statutes of 1986.[23]

III. DO THE CHALLENGED RULES CONTAIN "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

> ". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. . . . [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,[24] the California Court of Appeal upheld OAL's two-part test[25] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, or
- modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, or
- govern the agency's procedure?

If an uncodified rule satisfies both parts of the two-part test, OAL must conclude that it is a "regulation" subject to the APA. In applying the two-part test, we are mindful of the admonition of the *Grier* court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, . . . 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*[26] [Emphasis added.]"

Three California Court of Appeal cases provide additional guidance on the proper approach to take when determining whether an agency rule is subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in "a statutory scheme which the Legislature has [already] established. . . ."[27] But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ."[28]

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon" in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990)[29] held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation.[30] Statutes may legally be amended only through the legislative process; duly adopted regulations—

generally speaking—may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities are to focus on the content of the challenged agency rule, not the label placed on the rule by the agency:

> ". . . [The] Government Code . . . [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.* . . . [Emphasis added.]"[31]

A. DO THE CHALLENGED RULES CONSTITUTE "STANDARDS OF GENERAL APPLICATION"?

For an agency policy to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to members of a class, kind, or order.[32]

On their face, the "Open Meeting Act Chapter 641/86 Adjustment Worksheet" ("Adjustment Worksheet") and the "State Controller's Office, Division of Accounting and Reporting, Open Meetings Act Claim Review Procedures" ("Claim Review Procedures") apply to all claims for reimbursement of state mandated costs submitted pursuant to section 12 of chapter 641 of the Statutes of 1986. In its response, the SCO argues that the reimbursement limitation of 30 minutes per page and 5 minutes per agenda was merely a reference point and not used in every single case by the auditor and, therefore, was not a standard of general application.[33]

> "In the present case, the time frame in question does not fall within the meaning of a 'standard of general application.' Requesters claim that the 30 minute per page and five minutes per agenda limitations established the maximum amount the SCO would approve for reimbursement in every single case. The SCO asserts however, the time frame was utilized as a reference point to gauge what was a 'reasonable cost.'"

"What is or is not reasonable in every situation cannot be determined with preciseness. Thus, under generally accepted auditing standards, the SCO must rely on auditing judgment in determining when costs claimed under this mandate are excessive and unreasonable. It was contemplated that flexibility be part of the audit process and that some deviation from the 30/5 minute time frame would occur. The auditor assigned to review a claim had the discretion to approve costs per page beyond the reference 30/5 minute time frame if in the auditor's judgment the additional costs were warranted. The worksheet utilized by the SCO was merely to assist the auditor in making this determination."

"The SCO reviewed each claim for reimbursement in light of the limitations imposed by the statute; under Government Code section 54954.3 a brief (*not* lengthy) as well as a general, (*not* specific) description of an item of business is what needed to be in an agenda. Such descriptions need not exceed 20 words. Based upon the documentation pertaining to each claim, the auditor made determinations whether the costs claimed were excessive or unreasonable. Not all claims that were submitted to the SCO were determined to be excessive."

"With respect to this mandate, the SCO did not adopt a standard of general application. If the applicable law were literally construed and applied, the standard of general application would be the requirement of providing supporting documentation for each and every claim."

". . . . For all claims submitted to the SCO, auditors has to exercise their judgment based upon the particular situation presented. As a result, no standard of general application was imposed."[34]

In *Taye v. Coye* (1994),[35] the First District Court of Appeal was asked to determine whether an audit procedure used by the SCO for Medi-Cal provided supplies was a "regulation" for purposes of the APA. The court found the audit procedure was not a "standard of general application" based upon the auditor's declaration that:

"The audit procedures used to conduct the audit of Pride Home Care Medical were designed to fit the particular conditions that were encountered upon the arrival at the audit site."[36]

The challenged guidelines in the "Adjustment Worksheet" and "Claim Review Procedures" were clearly not designed to fit the particular conditions at a particular site. The challenged guidelines were included on two different forms to be *used on all claims submitted for reimbursement* of the cost of preparing and posting agendas pursuant to section 12 of Chapter 641 of the Statutes of 1986. The challenged guidelines were clearly intended to have general application. An explanation on how the guidelines were utilized is contained in the letter from Sonia A. Hehir, Staff Counsel, SCO, to Ms. Paula Higashi, Executive Director, Commission on State Mandates, regarding the claim for reimbursement by the San Diego Unified School District:

> "Based on an analysis of the materials reviewed, and in light of the underlying intent of the mandate, the SCO established a general time guideline to use for reviewing claims for reimbursement. It was determined that a district could reasonably prepare an agenda that met the requirements of the Open Meetings Act, within the time frame used by districts that fell in the 30 to 45 minute per page range. Five (5) minutes was determined as sufficient time for posting a single agenda. Using this time period as a general guideline, the SCO proceeded to audit the specific claims of each entity including those of SDUSD. To facilitate any adjustments that may need to be made to a claim, a worksheet was developed. . . . The auditor reviewing the claim had discretion to approve costs per page beyond the 45 minute guideline if the auditor felt the additional costs were warranted."

The APA does not provide that to be a "regulation" a rule must be used "in every single case." The statutory definition of "regulation" does not restrict the term "regulation" to agency rules that are binding and mandatory.[37] In addition, Government Code section 11340.5, which authorizes OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

> "(a) No state agency shall *issue, utilize, enforce, or attempt to enforce* any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

This statute prohibits agencies from performing *four* separately listed actions involving usage of an agency rule subject to the APA: (1) issuance, (2) utilization, (3) enforcement, or (4) attempted enforcement.

Apparently anticipating that state agencies would make creative legal arguments in an effort to avoid APA compliance, the statute prohibits not only enforcement, attempted enforcement, and utilization of rules subject to the APA, but also the mere *issuance* of such rules. It is absolutely clear that the SCO "issued" and "utilized" the "Adjustment Worksheet" and "Claims Review Procedures." It seems clear that section 11340.5 is intended to preclude agencies from evading APA compliance if the regulated party is unable to prove that the agency "enforced" or "attempted to enforce" the rule.

Government Code section 11340.5 undermines the SCO's argument in another way. Section 11340.5 proscribes not only agency rules which the agency overtly labels or treats as binding and mandatory, but also agency rules which are more benignly characterized by the agency--described as no more than a "guideline," a "criterion," a "bulletin," a "manual," an "instruction," or a "standard."

The California Court of Appeal has made it clear that reviewing authorities are to focus on the content of a challenged rule, not the label placed on the rule by the agency.[38] More important than the agency's characterization of the challenged rule is the nature of the effect and impact of the rule on the public.[39]

The "Adjustment Worksheet" instructed the claimant to list the "average time per page to prepare and post the agenda samples" in subdivision "(D)". The "Adjustment Worksheet" then provided in bolded, oversized, capital letters:

> **"[ ] MINUTES PER PAGE CALCULATION IS REASONABLE. NO ADJUSTMENT NECESSARY"**
>
> **"IF THE MINUTES PER PAGE CALCULATED IN LINE "D" IS 45 MINUTES OR MORE, MAKE THE FOLLOWING ADJUSTMENT TO THIS MEETING'S TIME"**

Step 4 then directed the auditor to multiply the total pages to be reimbursed by 30 minutes and total agendas by 5 minutes.

The more lengthy "Claim Review Procedures" contained the following inquiries:

> "15. Was the amount of time spent by employees within normal expectation of 15 minutes per page for the activity of writing, composing or drafting brief agenda descriptions?
>
> 16. Was the amount of time spent by employees within normal expectation of 10 minutes per page for the activity of typing or word processing?
>
> 17. Was the amount of time spent by employees within normal expectation of 5 minutes per page for the activity of editing or reviewing?
>
> 18. Was the amount of time spent by employees within normal expectation for the activity of posting an agenda at a single location.?"

Although the SCO has indicated that the 30 minute per page and 5 minutes per agenda were just reference points, this is not made clear from the "Adjustment Worksheet" nor the "Claim Review Procedures." An auditor of a claim for agenda reimbursement under section 12 of chapter 641 of the Statutes of 1986 would most likely believe the 30 minutes per page and 5 minutes per agenda standard as being *mandatory* and, if not, certainly *very highly recommended.* As previously stated, it is the effect of the challenged rule on the public, rather than agency's characterization of the rule which is paramount.

It may be that the SCO analogizes compliance with the guidelines with the creation of a rebuttable presumption. The claimant exceeding the guideline results in a presumption that the claim is excessive. The presumption is rebuttable if the claim contains evidence that it reasonably took the claimant more time to propose and post their agendas. If this is the SCO's position, such a position does not solve the APA problem in the SCO's favor: provisions creating rebuttable presumptions have specifically been found by the Court of Appeal to be "regulations."[40]

In any event, the challenged rules contained in the "Adjustment Worksheet" and "Claim Review Procedures" are standards of general application since they apply to all members of an open class.

Having concluded that the challenged rules are standards of general application, OAL must consider whether the challenged rules meet the second prong of the two-part test.

B. DO THE CHALLENGED RULES IMPLEMENT, INTERPRET OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE SCO OR GOVERN THE SCO'S PROCEDURE?

Section 12410 of the Government Code provides in part:

> "The Controller shall audit all claims against the state, and may audit the disbursement of any state money, for corrections, legality, and for sufficient provisions of law for payment. . . ."

Subdivision (a) of Government Code section 925.6 provides in part:

> "The Controller shall not draw his or her warrant for any claim until it has been audited by him or her in conformity with law and the general rules and regulations adopted by the board, governing the presentation and audit of claims. . . ."

Specifically with respect to claims for reimbursement for costs of state-mandated programs, subdivision (d)(2) of Government Code section 17561 provides in part:

> "The Controller shall pay these claims from funds appropriated therefor, provided that the Controller (A) audit the records of any local agency or school district to verify the actual amount of the mandated costs, (B) *may reduce any claim, which the Controller determines is excessive or unreasonable*, and (C) shall adjust the payment to correct for any underpayments or overpayments which occurred in previous fiscal years."

Even more specifically with respect to claims submitted by local agencies or school districts for reimbursement of the cost of preparing and posting agendas which are the subject of the challenged guidelines, section 54954.4 of the Government Code provides in part:

> "(a) The Legislature hereby finds and declares that Section 12 of Chapter 641 of the Statutes of 1986, authorizing reimbursement to local agencies and school districts for costs mandated by the state pursuant to that act, shall

be interpreted strictly. The intent of the Legislature is to provide reimbursement for only those costs which are clearly and unequivocally incurred as the direct and necessary result of compliance with Chapter 641 of the Statutes of 1986.

(b) In this regard, the Legislature directs all state employees and officials involved in reviewing or authorizing claims for reimbursement, or otherwise participating in the reimbursement process, to rigorously review each claim and authorize only those claims, or parts thereof, which represent costs which are clearly and unequivocally incurred as the direct and necessary result of compliance with Chapter 641 of the Statutes of 1986 and for which complete documentation exists. For purposes of Section 54954.2 costs eligible for reimbursement shall only include the actual cost to post a single agenda for any one meeting.

. . . ."

Clearly, the challenged 30 minutes per page and 5 minutes per agenda guidelines implement, interpret, and make specific the statutory auditing responsibilities of the SCO. OAL concludes, therefore, that the challenged rules are not only standards of general application, but also implement, interpret, and make specific the law enforced or administered by the SCO.[41] Thus, the challenged rules are "regulations" within the meaning of the APA.[42]

IV. DO THE CHALLENGED RULES FOUND TO BE "REGULATIONS" FALL WITHIN ANY RECOGNIZED EXEMPTION FROM APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.[43] In *United Systems of Arkansas v. Stamison* (1998),[44] the California Court of Appeal rejected an argument by the Director of the Department of General Services that language in the Public Contract Code had the effect of exempting rules governing bid protests from the APA.

According to the Stamison Court:

> "*When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language. (See, e.g., Gov. Code, section*

16487 ['The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. These procedures are exempt from the Administrative Procedure Act.']; Gov. Code, section 18211 ['Regulations adopted by the State Personnel Board are exempt from the Administrative Procedure Act']; Labor Code, section 1185 [orders of Industrial Welfare Commission 'expressly exempted' from the APA].) [Emphasis added.]"[45]

Express statutory APA exemptions may be divided into two categories: special and general.[46] *Special* express statutory exemptions typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's enabling act. *General* express statutory exemptions typically: (1) apply across the board to all state agencies and (2) are found in the APA. An example of an express special exemption is Penal Code section 5058, subdivision (d)(1), which exempts pilot programs of the Department of Corrections under specified conditions. An example of a *general* express exemption is Government Code section 11342, subdivision (g), part of which exempts "internal management" regulations of all state agencies from the APA.

A. DO THE CHALLENGED RULES FALL WITHIN ANY SPECIAL EXPRESS APA EXEMPTION?

The SCO does not contend that any special statutory exemption applies. Our independent research having also disclosed no special statutory exemption, we conclude that none applies.

APA exemptions must be express, and the Legislature knows what to say when it wishes to exempt agency rules from APA. For example, Government Code section 16485 authorizes the establishment of procedures for the transfer of bonds between funds in the State Treasury. Section 16487 of the Government Code provides:

> "The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. *These procedures are exempt from the Administrative Procedure Act* (Chapter 3.5 (commencing with Section 11340), Chapter 4, (commencing with Section 11370), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3)." (Emphasis added.)

It is clear from the quoted statute that the Legislature knows what to say when it intends that SCO procedures or guidelines be exempt from the APA. However, the Legislature has not elected to exempt SCO claiming guidelines from the APA.

B. DO THE CHALLENGED RULES FALL WITHIN ANY GENERAL EXPRESS APA EXEMPTION?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.[47] Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.[48]

Internal Management

The APA excepts policies which pertain solely to the internal management of a state agency from the notice and hearing requirements of the Act.[49] Government Code section 11342, subdivision (g) states:

> " 'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency*. [Emphasis added.]"

However, as the *Grier* Court found: ". . . the definition of regulation is broad, as contrasted with the scope of the internal management exception, which is narrow."[50] Internal management policies are those designed to govern the internal operations of the Department. The exception does not apply to ". . . the rules necessary to properly consider the interests of all . . . under the . . . . statutes . . ."[51]

In *City of San Joaquin v. State Board of Equalization* (1970),[52] a statistical accounting technique was held not to be a "regulation" within the meaning of the APA. The *San Joaquin* court held the pooling procedure required by the Board's challenged rule was:

> "merely a statistical accounting technique to enable the Board to allocate, as expediently and economically as possible, to each [participating city], its fair share of sales taxes collected by the Board on that city's behalf."

Considering *San Joaquin*, the California Court of Appeal, in *Grier v. Kizer* (1990) wrote:

> "In view of the Supreme Court's subsequent recognition in *Armistead* of the distinction between purely internal rules which merely govern an agency's procedure and rules which have external impact so as to invoke the APA, [citations] *San Joaquin's* holding that statistical accounting techniques are exempt from the APA appears to have lost its precedential value. After *Armistead*, it would appear an accounting procedure resulting in a possibly disproportionate allocation of tax revenues would be the appropriate subject of a regulation adopted pursuant to the APA, allowing interested parties to be heard on the merits of the proposed rule."[53]

The rules at issue in this determination clearly affect the interests of all local agencies or school districts submitting claims for reimbursement of state mandated costs pursuant to section 12 of chapter 641 of the Statute of 1986. For this reason, the challenged SCO guidelines are not covered by the internal management exception to the APA.

Forms and Instructions

Government Code section 11342, subdivision (g), provides in part:

> " 'Regulation' does not mean . . . *any form* prescribed by a state agency or any instructions relating to the use of the form, *but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.* [Emphasis added.]"

This statutory provision contains a significant restriction on the use of the "forms" exemption. In a previous determination, OAL addressed the "forms exemption" from the APA:

> "According to the leading case, *Stoneham v. Rushen*, the [statutory] language quoted directly above creates a 'statutory exemption relating to *operational* forms.' (Emphasis added.)[54] An example of an operational form would be as follows: a form which simply provides an operationally convenient space in which, for example, applicants for licenses can write

down information that existing provisions of law already require them to furnish to the agency, such as the name of the applicant."

"By contrast, if an agency form goes beyond *existing legal requirements*, then, under Government Code section 11342, subdivision (b), a formal regulation is '*needed to implement the law under which the form is issued.*' For example, a hypothetical licensing agency form might require applicants to fill in marital status, race, and religion—when none of these items of information was required by existing law. The hypothetical licensing agency would be making new law: i.e., 'no application for a license will be approved unless the applicant completes our application form, i.e., furnishes his or her name, marital status, race, and religion.' [Emphasis added.]"

"In other words, according to the *Stoneham* Court, if a form contains 'uniform substantive' rules which are used to implement a statute, those rules must be promulgated in compliance with the APA. On the other hand, a 'regulation is *not* needed to implement the law under which the form is issued' (emphasis added) insofar as the form in question is a simple operational form limited in scope to *existing* legal requirements. [Emphasis original.]"[55]

OAL concludes that the "forms exemption" does not apply to the forms at issue in this determination because the challenged regulations contained in the forms go beyond existing legal requirements.

CONCLUSION

The Office of Administrative Law concludes that the guidelines contained in the "Adjustment Worksheet" and "Claim Review Procedures" which assign 30 minutes per page and 5 minutes per agenda for reimbursement for the preparation and posting of Open Meeting Act Agendas are "regulations" which are invalid because they should have been, but were not, adopted pursuant to the APA.

DATE: October 29, 1999

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ENDNOTES

1. This request for determination was filed by James A. Cunningham, Legislative Mandate Specialist, *San Diego Unified School District,* 4100 Normal Street, San Diego, CA 92103-2682. Others joining in the request were: Leslie Hobson, Senior Financial Analyst, *County of Placer*, 175 Fulweiler Avenue, Auburn, California 95603; Marcia C. Faulkner, Office of the Auditor/Controller-Recorder, *County of San Bernardino*, 222 West Hospitality Lane, San Bernardino, California 92415-0015; Jon Sharpe, Vice Chancellor – Business, *State Center Community College District*, 1525 E. Weldon Avenue, Fresno, CA 93704; and Bart J. Thiltgen, Assistant City Attorney, *City of Stockton*, 425 North El Dorado Street, Stockton, California 95202. The agency was represented by Sonia A. Hehir, Staff Counsel, *Office of the State Controll*er, 300 Capitol Mall, Suite 700, Sacramento, CA 95814-5879, (916) 322-3030.

2. This determination may be cited as "**1999 OAL Determination No. 25.**"

   Pursuant to Title 1, CCR, section 127, this determination becomes effective on the 30th day after filing with the Secretary of State, which filing occurred on the date shown on the first page of this determination.

   Government Code section 11340.5, subdivision (d), provides that:

   > "Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published [in the California Regulatory Notice Register]."

   Determinations are ordinarily published in the Notice Register within two weeks of the date of filing with the Secretary of State.

3. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.

4. OAL does not review alleged underground regulations for compliance with the APA's six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. However, in the event regulations were proposed by the Department under the APA, OAL would review the *proposed* regulations for compliance with the six statutory criteria. (Government Code sections 11349 and 11349.1.)

5. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121 (a), provides:

" '*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which *is invalid and unenforceable* unless

> (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
>
> (2) it has been exempted by statute from the requirements of the APA. [Emphasis added.]"

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); *and Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)—now subd. (g)—yet had not been adopted pursuant to the APA, was "*invalid*"). We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier,* however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer.*

6. *OAL Determinations Entitled to Great Weight in Court*

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, disapproved on other grounds in *Tidewater.* Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10**, CRNR 96, No. 8-Z, February 23, 1996, p. 293. The *Grier* court concurred with OAL's conclusion, stating that:

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit

method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted for its consideration in the case, the court further found:

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of [a statute] by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration.*[Id.; emphasis added.]"

See also *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886 (same holding) and note 5 of **1990 OAL Determination No. 4,** California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384, at p. 391 (reasons for according due deference consideration to OAL determinations).

7. According to Government Code section 11370:

> "*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *Chapter 4.5* (commencing with Section 11400, and *Chapter 5* (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act. [Emphasis added.]"

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

8 California Constitution, article V, section 11.

9. Government Code section 12410.

10. California Constitution, article XVI, section 7.

11. Government Code section 925.6, subdivision(a).

12. Request for Determination, page 2.

13. Agency response, pages 5 and 6.

14. Agency response, page 6.

15. Government Code section 11346.4.

16. California Code of Regulations, title 2, sections 1181 et seq.

17. California Code of Regulations, title 1, section 121(b).

18. Government Code section 11342, subdivision (a).

19. Agency response, pages 1 and 2.

20. 2 Cal.App.4th 47, 3 Cal.Rptr. 2d 264

21. 3 Cal.Rptr. 2d at 265

22 3 Cal.Rptr. 2d at 269.

23. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of the APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).

24. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. Grier, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though Poschman had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, *in Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," *citing Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from G*rier v. Kizer*.

25. The *Grier* Court stated:

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, . . . slip op'n., at p. 8.) [*Grier,* disapproved on other grounds in *Tidewater*]."

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion—**1987 OAL Determination No. 10**—was published in California Regulatory Notice Register 96, No. 8-Z, February 23, 1996, p. 292.

26. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001,1010, 74 Cal.Rptr.2d 407, 412, review denied.

27. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.

28. Id.

29. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.

30. Id.

31. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.

32. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

33 Agency response pages 4 and 5.

34 Agency response, pages 4 and 5.

35. 29 Cal.App.4th 1339, 35 Cal.Rptr. 2d 27

36. 35 Cal.Rptr. 2d 27, at page 31.

37. Government Code section 11342, subdivision (g); 1999 OAL Determination No. 17, CRNR 99, No. 33-Z, August 13, 1999, p. 1575.

38. *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993) 12 Cal.App. 4th 697, 702, 16 Cal.Rptr.2d 25, 28.

39. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.

40 *Union of American Physicians v. Kizer* (1990) 223 Cal.App. 3d 490, 501, 277 Cal.Rptr. 886, 892.

41. In addition, OAL concludes that the challenged rules are standards of general application which govern SCO procedure. See Government Code section 11342, subdivision (g).

42. Our conclusion appears to be consistent with the conclusions arrived at by the SCO legal staff in 1990 to the effect that some desk review practices concerning mandated claim review might be considered underground regulations. Attached to the request for determination now under review was a letter dated September 13, 1990 typed on SCO letterhead from Larry Gercovich to Arnold Schuler. This letter stated:

> "Attached for your information is a copy of an opinion issued last week by the Court of Appeal, 2nd District, *in Union of American Physicians and Dentists and Sanford Marcus v. Kenneth Kizer*, et al. At this time I don't know whether a Petition for Review will be filed with the Supreme Court but I doubt, in any event, that the Supreme Court would accept the case."
>
> "A key holding from our standpoint is the court's finding that the Department of Health Services' use of statistical sampling and extrapolation in provider audits amounted to an invalid 'underground' regulation. Such audit methodology could not be utilized unless incorporated in a formal regulation adopted pursuant to the Administrative Procedures Act. Failure to promulgate a formal regulation for that purpose may result in audit findings based on a sampling and extrapolation being unenforceable."
>
> "Our immediate concern which we will be reviewing is whether a formal regulation should be adopted for this purpose for unclaimed property audits."
>
> "I don't know whether statistical samplings are used in any audits conducted by the Division of Audits and LGFA. I'm asking Jack and Earl to advise me on this."
>
> "Though not involving statistical samplings, *it is very possible that some of the desk review practices followed by the Division of Accounting on mandated cost claims may also be considered as 'underground' regulations*. Such practices may also have to be reviewed. (Emphasis added.)"

The agency response did not discuss this letter.

43. Government Code section 11346.

44. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.

45. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.

46. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself).

47. Government Code section 11346.

48. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec.11342, subd. (g).)

    c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1); emphasis added.)

    d. Rules directed to a *specifically named* person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

    e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342. subd. (g).)

    f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, pp. 168-169, 175-177, CRNR 91, No. 43-Z, October 25, 1991, p. 1458-1459, 1461-1462. In *Grier v. Kizer* ((1990) 219 Cal.App.3d 422, 437-438, 268 Cal.Rptr. 244, 253), the court reached the same conclusion as OAL did in **1987 OAL Determination No. 10**, pp. 25-28 (summary published in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 63); complete determination published on February 23, 1996, CRNR 96, No. 8-Z, p. 293, 304-305), rejecting the idea *that City of San Joaquin* (cited above) was still good law.

49. Government Code section 11342, subdivision (g).

50. *Grier v. Kizer*, supra, 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 251, disapproved on another point, *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198.

51. *City of San Marcos v. California Highway Commission, Department of Transportation* (1976) 60 Cal.App.3d 383, 408, 131 Cal.Rptr. 804, 820, quoted *in Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204-205, 149 Cal.Rptr. 1, 3.

52. (1970) 9 Cal.App.3d 365, 88 Cal.Rptr. 12, 20.

53. (1990) 219 Cal.App.3d 422, 442, 268 Cal.Rptr. 244, 253.

54. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.

55. **1993 OAL Determination No. 5**, CRNR 94, No. 2-Z, January 14, 1994, p. 61, 105; typewritten version, p. 266.